Public Prosecutor v Febian Selawi

HIGH COURT (MIRI) — CRIMINAL CASE NO MYY-45 302–1/1 OF 2013
STEPHEN CHUNG J
2 JANUARY 2014

Criminal Law — General exceptions — Unsoundness of mind — Insanity — Accused person charged for offence of causing death for murding three year old — Accused person heavy drinker and drug abuser — Defence that accused person had difficulty to sleep and concentrate in what he was trying to do due to auditory hallucinations — Whether insanity proven — Penal Code ss 84 & 302

The accused was charged for an offence under s 302 of the Penal Code ('the Code') for causing the death of one Evelyn Irene ('the deceased') who was three years old. The accused was 27 years old who was a heavy drinker and also a drug abuser. The accused was staying with his uncle. The accused's cousin ('PW3') testified that he saw the accused cutting a picture of the baby Jesus with a pair of scissors at the kitchen. PW3 scolded the accused and asked him to stop cutting the picture. Upon being scolded, the accused became angry and went out from the kitchen with the scissors in his hand. PW3 testified that he saw the accused suddenly grabbed the deceased, who was his niece, flung her on a wooden table outside the kitchen and stabbed her. PW3, PW4 and PW5, who were cousins, tried to restrain the accused but the accused stabbed one of them, went inside the kitchen, grabbed three parang and ran away. The accused then attacked some Indonesians, who were working at the plantation and staying at the quarters, because he suspected that they wanted to harm him. The accused was then subdued and arrested. A forensic pathologist ('PW11') testified that the deceased sustained a stab wound to the chest which penetrated the heart of the deceased where the aorta sustained two punctures which caused bleeding in the chest cavity. PW11 testified that the cause of death was chest injury due to the stab wound which was fatal and in the ordinary course of nature to cause death. The accused relied on the defence of insanity and or unsoundness of mind under s 84 of the Code. The accused gave evidence in the trial that he had difficulty to sleep and concentrate in what he was trying to do due to auditory hallucinations.

Held, acquitting the accused:

(1) DW2 examined and treated the accused at Sentosa Hospital for a period of two months. He interviewed the accused during the accused stay at the hospital. DW2 diagnosed the accused to have suffered from substance induced psychosis and substance abuse disorder. DW2 testified that the

accused was suffering from substance induced psychosis at the time of the incident. DW2 also testified that although the accused had some awareness of what he was doing at the time of the incident, the accused did not know that what he was doing was right or wrong (see para 25).

(2) The accused had stabbed the deceased which caused her death but he did not have the motive nor the mens rea when he stabbed the deceased. The evidence established that at the time of committing the act the accused was of unsound mind and that he did not know what he was doing was wrong or contrary to law (see para 28).

(3) Section 84 of the Code states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The accused had established the defence of insanity under s 84 of the Code. The accused is acquitted of the charge made against him under s 302 of the Code on the ground of mental disorder (see paras 29–30).

(4) Pursuant to s 348(1) of the Criminal Procedure Code ('CPC'), the accused was to be kept in safe custody in Lambir Prison, Miri and that he shall have access to medical treatment whenever necessary. Further, pursuant to s 348(1) of the CPC, the court shall report the case for the orders of the Ruler of the State in which the trial was held. Section 348(2) provided that the Ruler may order the accused to be confined in a psychiatric hospital during the pleasure of the Ruler of the State (see para 31).

[Bahasa Malaysia summary

Tertuduh dituduh untuk satu kesalahan di bawah s 302 Kanun Keseksaan ('Kanun') kerana menyebabkan kematian kepada seorang Evelyn Irene ('si mati') yang berumur tiga tahun. Tertuduh berumur 27 tahun yang merupakan seorang kuat minum dan juga penagih dadah. Tertuduh tinggal bersama pakciknya. Saudara tertuduh ('PW3') memberi keterangan bahawa dia melihat tertuduh memotong gambar 'baby Jesus' dengan sebilah gunting di dapur. PW3 memarahi tertuduh dan memintanya untuk berhenti memotong gambar. Oleh kerana dimarahi, tertuduh menjadi marah dan keluar dari dapur dengan gunting di tangannya. PW3 memberi keterangan bahawa dia melihat tertuduh tiba-tiba memegang si mati, yang merupakan anak saudaranya, memcampakkannya ke atas meja kayu di luar dapur dan menikam anak saudaranya. PW3, PW4 dan PW5 yang merupakan saudaranya, cuba untuk menaha tertuduh tetapi tertuduh menikam salah seorang daripada mereka, masuk ke dapur, mengambil tiga parang dan melarikan diri. Tertuduh kemudiannya menyerang beberapa warganegara Indonesia, yang berkerja di ladang dan tinggal di kuarters, kerana dia mengesyaki mereka akan mencederakannya. Tertuduh kemudian ditahan dan ditangkap. Ahli patologi

forensik ('PW11') memberi keterangan bahawa si mati mengalami luka tikaman di dada yang menembusi jantung si mati di mana aorta mengalami dua tusukan yang menyebabkan pendarahan di dalam rongga dada, PW11 memberi keterangan bahawa sebab kematian adalah kecederaan di dada disebabkan oleh luka tikaman yang fatal dan dalam keadaan biasa menyebabkan kematian. Tertuduh bergantung kepada pembelaan tidak siuman dan/atau ketaksempurnaan akal di bawah s 84 Kanun. Tertuduh memberikan keterangan dalam perbicaraan bahawa dia mempunyai kesukaran untuk tidur dan menumpukan perhatian dalam apa yang hendak dibuat disebabkan oleh halusinasi auditori.

Diputuskan, membebaskan tertuduh:

(1) DW2 memeriksa dan merawat tertuduh di Hospital Sentosa untuk tempoh dua bulan. Dia menemubual tertuduh sewaktu tertuduh berada di hospital. DW2 mendiagnosis tertuduh untuk mengalami dariapada bahan yang menyebabkan psikosis dan bahan yang menyebabkan gangguan penderaan. DW2 memberi keterangan bahawa tertuduh mengalami daripada bahan yang menyebabkan psikosis sewaktu kejadian. DW2 juga memberi keterangan bahawa walaupun tertuduh mempunyai kesedaran akan apa yang dilakukannya pada waktu kejadian, dia tidak mengetahui apa yang dilakukannya adalah betul atau salah (lihat perenggan 25).

(2) Tertuduh telah menikam si mati yang mana menyebabkan kematiannya tetapi dia tidak mempunyai motif ataupun mens rea apabila dia menikam si mati. Keterangan yang dibuktikan bahawa pada masa melakukan perbuatan itu tertuduh adalah tidak siuman dan bahawa dia tidak mnegetahui apa yang dilakukannya bertentangan dengan undang-undang (lihat perenggan 28).

(3) Seksyen 84 Kanun menyatakan bahawa sesuatu bukanlah kesalahan yang mana dilakukan oleh seseorang yang, pada masa perbuatannya itu, disebabkan oleh tidak siuman, dengan tidak mengetahui keadaan semula jadi perbuatannya, atau apa yang dilakukannya adalah sama ada salah atau bertentangan dengan undang-undang. Tertuduh telah membuktikan pembelaan tidak waras di bawah s 84 Kanun. Tertuduh di bebaskan terhadap pertuduhan yang dikenakan ke atasnya di bawah s 302 Kanun atas sebab kurang siuman (lihat perenggan 29–30).

(4) Berikutan s 348(1) Kanun Tatacara Jenayah ('KTJ'), tertuduh hendaklah diletakkan di bawah jagaan Penjara Lambir, Miri dan bahawa dia akan mendapat akses kepada rawatan perubatan apabila perlu. Selanjutnya, menurut s 348(1) KTJ, mahkamah akan melaporkan kes untuk perintah Pemerintah Negeri di mana perbicaraan dijalankan. Seksyen 348(2) memperuntukkan Pemerintah boleh memerintahkan tertuduh untuk

diletakkan di hospital pskikiatri selama diperkenankan Pemerintah Negeri (lihat perenggan 31).]

Notes

For cases on unsoundness of mind, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 1097.

Cases referred to

John a/k Nyumbei v Public Prosecutor [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
Juraimi bin Husin v PP [1998] 1 MLJ 537; [1998] 2 CLJ 383, CA (refd)
PP v Ismail bin Ibrahim [1998] 3 MLJ 243; [1998] 2 CLJ 213, HC (refd)
Looi Kow Chai v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
PP v Misbah bin Saat [1997] 3 MLJ 495, HC (refd)
PP v Muhamad Suhaimi Abdul Aziz [2004] 1 CLJ 378, CA (refd)
PP v Zainal Abidin Mohd Zaid [1993] 1 CLJ 147, HC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 172A, 172A(4), 172A(5), 347, 348(1), 348(2)
Evidence Act 1950 ss 90A, 105(a)
Penal Code ss 84, 302

Noor Fadzila bt Ishak (Deputy Public Prosecutor, Attorney General's Chambers) for the complainant.
Ranbir Singh (Ranbir S Sangha & Co) for the accused.

Stephen Chung J

[1] The accused is charged for an offence under s 302 of the Penal Code for causing the death of Evelyn Irene who was three years old. The offence was committed on 27 February 2012 at about 6.30am at the workers quarters at Ladang Sejap, IOI Pelita Plantation Sdn Bhd, Tinjar, in the district of Baram, in the state of Sarawak. The charge reads as follows:

> Bahawa kamu pada 27.2.2012 pada jam lebih kurang 6.30 pagi bertempat di kuaters pekerja Ladang Sejap IOI Pelita Plantation Sdn Bhd, Tinjar, di dalam daerah Baram, di dalam Negeri Sarawak, telah melukakan pembunuhan dengan menyebabkan kematian Evelyn Irene (P), dan dengan yang demikian telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] After the accused was arrested and remanded in prison pending completion of the investigation of this case, on 10 August 2012 he was admitted to Hospital Sentosa, Kuching for psychiatric observation and

treatment. On 28 June 2013, during case management, the learned DPP tendered a medical report of Dr Law Kim Kah, Director of Sentosa Hospital (exh P1) which certified that the accused was fit to stand trial under the charge.

[3] During a pre-trial conference learned counsel on behalf of the accused discussed and agreed with the prosecution to use and accept witness statements by the prosecution witnesses. This agreement was tendered as exh P3. The defence counsel and prosecution also agreed on the facts and legal issues for trial which were reduced into writing and signed by the accused, his counsel and the DPP under s 172A(4) and (5) of the Criminal Procedure Code ('CPC'). This agreement was tendered as exh P4.

[4] The facts in this case as per exh P4 were agreed as follows:

(a) that the deceased (Evelyn Irene) is dead;

(b) that the death of the deceased was caused by the actions of the accused;

(c) that the action of the accused that caused the death of the deceased is a stab to the deceased's chest using a pair of scissors;

(d) that the stab wound to the chest penetrated the deceased's heart which caused the deceased serious injury in the chest area whereby the aorta sustained two punctures which caused bleeding in the chest cavity;

(e) the cause of death of the deceased was 'Chest injury due to stab wound'; and

(f) the accused killed the deceased on 27 February 2012 at about 6.30am at the workers quarters at Ladang Sejap, IOI Pelita Plantation Sdn Bhd, Tinjar, in the District of Baram, in the State of Sarawak.

[5] Paragraph 2 of P4 stated that the defence has no objection to the following documents being tendered as evidence which have been supplied by the prosecution to the defence pursuant to s 51A of the CPC:

(a) Beluru Police Report No: BLU/RPT/0113/2012;

(b) Beluru Police Report No: BLU/RPT/0114/2012;

(c) Beluru Police Report No: BLU/RPT/0117/2012;

(d) Beluru Police Report No: 120/2012;

(e) Beluru Police Report No: BLU/RPT/0121/2012;

(f) Marudi Police Report No: Marudi/RPT/000199/12;

(g) *borang permohonan bagi pemeriksaan forensik/toksikologi* (application form for forensic/toxicology examination) dated 28 February 2012);

(h) *borang pengendalian spesimen* (specimen undertaking form) dated 28 February 2012;

(i) application letter from IPD Marudi to be supplied with the DNA sample of Evelyn Irene dated 5 June 2012;

(j) application letter from IPD Marudi to be supplied with the DNA sample of Febian Selawi dated 5 June 2012;

(k) application letter from IPD Marudi to be supplied with the DNA sample of Abdul Aziz bin Saling dated 5 June 2012;

(l) s 90A of the Evidence Act 1950 certificate dated 2 June 2012 together with four photographs showing the place where the accused was arrested;

(m) s 90A of the Evidence Act certificate dated 2 June 2012 together with 38 photographs showing the place where the accused slashed Abdul Aziz bin Saleh;

(n) s 90A of the Evidence Act certificate dated 2 June 2012 together with six photographs showing Abdul Aziz bin Saleh;

(o) 31 photographs of autopsy;

(p) 47 photographs of the exhibits seized;

(q) Pol 31 form dated 8 June 2012;

(r) medical certificate of cause of death (after post mortem) dated 28 February 2012;

(s) medical report on the deceased;

(t) Pol 59 (request for examination by a doctor on a person involved in a police case) dated 27 February 2012;

(u) medical report on Muhd Sabir Hamu;

(v) chemist report (KG) FOR 863/12-0;

(w) autopsy report on the deceased; and

(x) expert report by Dr Lau Kim Kah dated 11 October 2012.

[6] Paragraph 3 of P4 stated that the defence did not challenge and accepted that Dr Norlina bt Anuar, Dr Norliza bt Ibrahim and Puan Zaliha bt Saudi were experts in their respective fields.

[7] Paragraph 4 of P4 stated that the defence has no objection to the prosecution tendering the following exhibits analysed by Zaliha bt Saudi as evidence and or to be marked as exhibits in court:

(a) E1: a pair of scissors with signs of blood on it (seized at the place of the incident);

(b) E2: a lock of hair believed to be from the deceased (found at the place of incident);

(c) E3: a singlet with white and red stripes believed to be that of the deceased;

(d) E4: two pieces of necklace pink in colour belonging to the deceased and believed to have broken during the incident (found at the place of the incident);

(e) E5: a pair of trousers, yellow in colour with signs of blood on it;

(f) E6: a swab of blood at the place of the incident believed to be from the deceased;

(g) E7: blood sample of the deceased taken for the purpose of DNA analysis;

(h) E10: nail clippings from the right hand of the deceased (taken during the post mortem);

(i) E11: nail clippings from the left hand of the deceased (taken during the post mortem);

(j) E12: hair sample of the deceased taken during the post mortem;

(k) E13: accused blood sample;

(l) E14: accused blood sample;

(m) E16: nail clipping samples from the left hand of the accused;

(n) E17: a long parang black in colour and 26 inches in length (seized at the place of the incident);

(o) E18: a long parang brown in colour and 27 1/2 inches in length (seized at the place of the incident);

(p) E19: a short parang grey in colour and 16 inches in length (seized at the place of the incident);

(q) E20: blood sample taken from the place of the incident;

(r) blood sample of Abdul Aajis b Saling;

(s) E22: rubber mat taken from the place of the incident with the presence of blood spatter; and

(t) E23: glass fragments recovered from the place of the incident.

[8] The duty of a judge, sitting alone, at the close for the prosecution is to determine as a trier of facts whether the prosecution has made out a prima facie case against the accused person. The judge must subject the evidence of the

prosecution to a maximum evaluation: *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734.

[9] The accused was 27 years old at the time of the incident. His parents divorced when he was two years old and he was looked after by his grandparents. The accused only completed primary school and moved from one odd job to another either in timber camps or in Miri. He started to drink heavily and also took drugs including *syabu*.

[10] In February, 2012, the accused was staying with his uncle Nyurang and family at the workers' quarters at Ladang Sejap, IOI Pelita Plantation, Tinjar, Baram.

[11] PW3, a cousin of the accused, testified that on 27 February 2012 at about 6am at the quarters where they were staying, he saw the accused cutting a picture of the baby Jesus with a pair of scissors at the kitchen. PW3 scolded the accused and asked him to stop cutting the picture. The accused being scolded, was angry and went out from the kitchen with the scissors in his hand. PW3 testified that he saw the accused suddenly grabbed Evelyn (the deceased), who was his niece, flung her on a wooden table outside the kitchen and stabbed her.

[12] PW3, PW4 and PW5, who were cousins, tried to restrain the accused but the accused stabbed one of them, went inside the kitchen, grabbed three parangs and ran away. The accused then attacked some Indonesians, who were working at the plantation and staying at the quarters, because he suspected that they wanted to harm him. The accused was then subdued and arrested.

[13] The evidence of PW3, PW4 and PW5, who were eye witnesses of the unfortunate incident, established that the accused had stabbed the deceased on the wooden table outside the kitchen.

[14] PW6, the father of the deceased, identified the deceased at the mortuary at Miri Hospital on 28 February 2012 at the post mortem. PW11, a forensic pathologist at Kuching General Hospital, performed the post mortem on the deceased. She prepared a report on the post mortem (exh P54). PW11 testified that the deceased sustained a stab wound to the chest which penetrated the heart of the deceased whereby the aorta sustained two punctures which caused bleeding in the chest cavity. PW11 testified that the cause of death was chest injury due to the stab wound which was fatal and in the ordinary course of nature to cause death.

[15] Although Dr Lau Kim Kah's report had been tendered as exh P1 by the prosecution, the purpose was to certify that the accused, after he was treated at

Sentosa Hospital, was capable of understanding the charge made against him and that he was fit to stand trial: see *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495, *Public Prosecutor v Zainal Abidin Mohd Zaid* [1993] 1 CLJ 147.

[16] Although the defence had indicated in P4 that the accused was relying on the defence of insanity, the prosecution and defence had not during the prosecution's case adduced any evidence on the accused insanity or unsoundness of mind.

[17] Based on the evidence adduced by the prosecution, the accused had stabbed the deceased which caused her death. The defence did not dispute and did not challenge this as a fact. In fact the accused had agreed as such and which is stated in the agreed facts contained in exh P4.

[18] The prosecution had made out a prima facie case against the accused for the offence for which he was charged under s 302 of the Penal Code. Therefore the accused was called to enter his defence to the charge.

[19] The defence referred to para 5 of P4 which stated that pursuant to the s 172A of the CPC the defence informed the prosecution that the defence was relying on the defence of insanity and or unsoundness of mind on the part of the accused under s 84 of the Penal Code. The defence also relied on the expert opinion of Dr Lau Kim Kah contained in his report.

[20] The defence also proposed that the prosecution would not object to the calling of Dr Lau Kim Kah as an expert witness in the field of psychiatry and the tendering of the hospital sentosa report prepared by Dr Lau Kim Kah dated 11 October 2012 including the opinion and facts contained therein. The NOP showed that the prosecution did not object and had in fact agreed to the above.

[21] In para 6 of P4, it is stated that in addition and supplementary to the facts stated in Dr Lau's report the accused relied on the following facts:

(a) that due to the voices the accused was having lack of sleep;

(b) that at all material times the voices had put the accused in fear that he was going to be attacked and killed;

(c) that the accused saw a picture of baby Jesus and Mother Mary at the place of the incident and proceeded to cut it with a pair of scissors because the voices told him that if he does the same the accused can become God himself and thereby substitute God and there would be no need to be in fear anymore from those people that wish to attack and kill the accused;

(d) the accused cousin then scolded the accused and told the accused that if the accused wanted to die the accused should go ahead;

(e) the accused cousin then pointed at the deceased and the accused took this to be an indication that the deceased should be killed. The deceased heard his aunty say that the deceased was dead but the accused did not believe it until he was in the prison;

(f) that at the time of the incident the accused was unable to think as to what was right and what was wrong and or what was contrary to law. The accused also did not know the nature of his act; and

(g) that the accused did not even know how he was arrested and the episode of unsoundness of mind continued even after his arrest and the accused being brought to hospital. Even on the way to the police station the accused was still hearing the voices which told him that the kampong folk were going to kill him under the approaching bridge. In the hospital the accused thought that the police was going to stab him just like how he had stabbed the deceased. In the hospital the accused thought everybody was going to kill him and saw people around with scissors.

[22] In establishing insanity, a distinction must be drawn between legal and medical insanity. Section 84 of the Penal Code is concerned with legal insanity, one that impairs the cognitive faculties of a person so that he is incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law: *Public Prosecutor v Muhamad Suhaimi Abdul Aziz* [2004] 1 CLJ 378, *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509.

[23] Where the defence of insanity was raised, the question to be asked was whether the accused had established that at the time of committing the act he was of unsound mind. The next question was whether his unsoundness of mind was of such a degree as to make him incapable of knowing the nature of his act or that what he was doing was wrong or contrary to law: *John a/k Nyumbei v Public Prosecutor*. The burden was on the accused to prove the defence of insanity on a balance of probabilities: s 105(a) of the Evidence Act 1950, *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383, *Public Prosecutor v Ismail bin Ibrahim* [1998] 3 MLJ 243; [1998] 2 CLJ 213.

[24] The accused gave evidence in the trial. His testimony in court was similar to what he had said to Dr Lau Kim Kah ('DW2') during his interviews by Dr Lau at Sentosa Hospital, including that he had difficulty to sleep and concentrate in what he was trying to do due to auditory hallucinations. What he had said to Dr Lau, recorded in his report marked as exh P1, are also referred to and contained in para 6 of P4 as agreed facts by the prosecution and defence. The learned DPP did not cross-examine the accused after he gave his evidence under oath.

[25] DW2 examined and treated the accused at Sentosa Hospital for a period of two months. He interviewed the accused during the accused stay at the hospital. DW2 diagnosed the accused to have suffered from substance induced psychosis and substance abuse disorder. DW2 testified that the accused was suffering from substance induced psychosis at the time of the incident. DW2 also testified that although the accused had some awareness of what he was doing at the time of the incident, the accused did not know that what he was doing was right or wrong.

[26] During his testimony DW2 was asked whether the accused was still hearing voices more than six months after his last consumption of drugs and DW2 said it might mean that the accused was actually suffering from schizophrenia which was triggered by the *syabu* that he was taking.

[27] The learned DPP did not cross-examine or challenge the testimony of DW2. The prosecution also did not present or adduce any evidence to contradict the testimony or opinion of DW2 that the accused at that time of incident was of unsound mind and that he did not know what he was doing was wrong or right. The learned DPP in her submissions had conceded that the accused was incapable to think as to what he did was wrong or right.

[28] Based on the evidence adduced at the end of the trial, the court found that the accused had stabbed the deceased which caused her death but he did not have the motive nor the mens rea when he stabbed the deceased. The evidence established that at the time of committing the act the accused was of unsound mind and that he did not know what he was doing was wrong or contrary to law.

[29] Section 84 of the Penal Code states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The accused had established the defence of insanity under s 84 of the Penal Code.

[30] The accused is acquitted of the charge made against him under s 302 of the Penal Code on the ground of mental disorder: see s 347 of the CPC.

[31] Pursuant to s 348(1) of the CPC, the accused is to be kept in safe custody in Lambir Prison, Miri and that he shall have access to medical treatment whenever necessary. Further, pursuant to s 348(1) of the CPC, the court shall report the case for the orders of the Ruler of the State in which the trial is held. Section 348(2) provides that the Ruler may order the accused to be confined in a psychiatric hospital during the pleasure of the ruler of the state.

Accused acquitted.

Reported by Afiq Mohamad Noor